

In the Matter of)
)
ETC Annual Reports and Certifications) WC Docket No. 14-58
)

Released: June 1, 2021

9211

support, eligible telecommunications carriers (ETCs) are subject to mandatory reporting and certification requirements.⁷ CAF Phase II support is available to ETCs that “elect to make a state-level commitment for six years.”⁸ During the support term, CAF Phase II recipients must demonstrate compliance with certain buildout obligations and interim reporting milestones.⁹

4. In the 2016 *Rate-of-Return Reform Order*, the Commission adopted significant reforms to the rules governing the provision of universal service support to rate-of-return carriers.¹⁰ The Commission adopted a voluntary path by which rate-of-return carriers may elect model-based support, known as the Alternative Connect America Cost Model (A-CAM), for a term of 10 years in exchange for meeting defined build-out obligations of voice and broadband services.¹¹ ETCs receiving A-CAM support must offer broadband service to 40% of the locations identified by the model by December 31, 2020.¹² That obligation increases to 100% by December 31, 2026,¹³ with a small margin of error.¹⁴

B. The Petitions

5. HT is a price cap ETC providing telecommunications services in Hawaii.¹⁵ HT is authorized to receive approximately \$4.42 million in CAF Phase II model-based support annually to offer voice and broadband service to 11,081 locations in Hawaii.¹⁶ This support is conditioned upon HT meeting a series of deployment milestones: HT must deploy to 40% of its total locations by December 31, 2017; to 60% of its total locations by December 31, 2018; to 80% of its total locations by December 31, 2019; and to 100% of its total locations by December 31, 2020.¹⁷ HT must report in the High Cost Universal Broadband (HUBB) portal, maintained by the Universal Service Administrative Company (USAC), annually on March 1, the locations to which it deployed in the prior calendar year and certify that “by the end of the calendar year, it was offering broadband meeting the requisite public interest obligations . . . to the required percentage of its supported locations in each state.”¹⁸

6. In March 2019, HT submitted its HUBB filing that indicated HT had deployed broadband service to 62.3% of its required locations by December 31, 2018.¹⁹ However, the Kilauea Volcano eruption, which began in May 2018, rendered 391 of these locations unserviceable.²⁰ While HT has subsequently restored service to 21 of these 391 locations, restoration to the remaining 370 is not

⁷ See 47 CFR § 54.316.

⁸ 47 CFR § 54.310(b).

⁹ 47 CFR § 54.310(c).

¹⁰ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3089, para. 1 (2016) (*Rate-of-Return Reform Order*).

¹¹ *Id.* at 3094-117, paras. 17-79.

¹² *Id.* at 3100-01, para. 32.

¹³ *Id.*

¹⁴ *Id.* at 3101, para. 33.

¹⁵ HT Petition at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 2.

¹⁸ 47 CFR § 54.316(b)(1).

¹⁹ HT Petition at 2.

²⁰ *Id.* at 3.

expected “for many years, if ever.”²¹ The eruption rendered inaccessible a substantial area within HT’s study area.²² HT estimates that many of these inaccessible areas will remain so for “many years beyond HT’s deployment obligation timeline of December 31, 2020.”²³

7. In May 2019, USAC notified HT that it would conduct a verification of HT’s compliance with its 60% milestone.²⁴ USAC confirmed that HT did indeed meet the 60% threshold because it had, without counting the 391 locations that were destroyed by the eruption, deployed to more than enough additional locations to meet its buildout obligation.²⁵ USAC determined that these 391 locations would not count towards HT’s ultimate buildout obligation because they had been destroyed, and directed that these locations be removed from the HUBB.²⁶

8. HT filed a petition for waiver of the Commission’s rules to allow HT to count towards its interim and final milestones the 370 locations to which HT had previously deployed broadband services but, due to the eruption, have been subsequently destroyed.²⁷ HT argues that strict compliance with the Commission’s rules is “inconsistent with the public interest because failing to include the locations destroyed in the Kilauea eruption will cause the appearance of non-compliance by HT despite the fact that HT timely deployed to its required number of units . . . and only became unserviceable due to the resulting lava destruction.”²⁸ HT states there was “no way for HT to anticipate or plan for such . . . [an] act of god.”²⁹ HT believes the “destruction and loss of service to 370 CAF II eligible locations by natural disaster warrant deviation from strict compliance with the Commission’s rules.”³⁰ HT also sought a waiver that would allow it to reduce its total build obligations by 153 locations that were destroyed or isolated before it come complete and certify deployment.³¹ However, HT later withdrew this portion of their waiver request when it subsequently determined it could meet its deployment obligations by building out to 153 different locations in two remote areas.³² We therefore do not address this portion of HT’s original waiver request.

9. TDS is a rate-of-return carrier that receives A-CAM support to offer broadband services in its California study area.³³ In exchange for the A-CAM model support, TDS is required to offer voice and broadband service to 2,339 locations in that study area.³⁴ To demonstrate compliance with its

²¹ *Id.* at 3.

²² *Id.* at 3.

²³ *Id.* at 4.

²⁴ *Id.* at 6.

²⁵ *Id.* at 7.

²⁶ *Id.* at 7.

²⁷ *Id.* at 7-8; Letter from Russell M. Blau and Patricia Cave, Counsel for HT, to Marlene H. Dortch, FCC Secretary, at 2 (Dec. 9, 2020) (HT Letter).

²⁸ HT Petition at 9.

²⁹ *Id.* at 9.

³⁰ *Id.* at 9.

³¹ HT Petition at 2.

³² See Letter from Russell M. Blau and Patricia Cave, Counsel for HT, to Marlene H. Dortch, FCC Secretary, at 2 (May 17, 2021).

³³ TDS Petition at 2.

³⁴ *Id.* at 2.

obligations, TDS is obligated to have deployed to 935 of those locations by December 31, 2020.³⁵ According to TDS, it was well on its way to meet this milestone prior to the COVID-19 pandemic.³⁶ However, TDS asserts that due to circumstances outside its control it will be unable to meet this milestone and will fall short of its buildout obligations in the Winterhaven and Hornitos areas.³⁷

10. In Winterhaven, TDS negotiated right-of-way access with the Quechan Indian Tribe and began construction on the Reservation on March 2, 2020.³⁸ On April 7, 2020, the Quechan Indian Tribe sent TDS a stop-work order, citing the pandemic.³⁹ TDS estimates that it completed 33% of the necessary construction prior to receiving the stop-work order,⁴⁰ but was unable to continue with the remaining construction until mid-September.⁴¹ TDS believes it can finish construction in this area by July 2021.⁴² In Hornitos, TDS's microwave engineering contractor was scheduled to go to the area in early March to "enable equipment engineering, specification, and proper FCC licensing for the project."⁴³ However, because of travel restrictions imposed by the pandemic, the engineer was unable to make the site visit until June 24, 2020.⁴⁴ TDS expects it will be able to complete construction in this area by July 2021.⁴⁵ We note that TDS filed this Petition on September 30, 2020, three months prior to the deployment deadline, when it determined it would not be able to meet its interim deployment obligations in a timely manner.

11. TDS requests a waiver of the Commission's rules because of "the substantial barrier to deployment caused by the COVID-19 pandemic."⁴⁶ Absent a waiver, the penalties include enhanced reporting requirements and withholding of A-CAM support.⁴⁷ TDS believes a waiver is warranted because these "measures and penalties will unnecessarily deprive [TDS] of resources to continue to connect more people and businesses in California to broadband . . . for the foreseeable future."⁴⁸ TDS argues that granting the waiver would not frustrate the purpose behind the reporting requirements because it was on track to exceed its obligations prior to the pandemic and has already resumed construction to these locations.⁴⁹ TDS states that the only reason it was unable to meet its location obligations by December 31, 2020 is because of a six-month pandemic-caused delay during which no work could be completed.⁵⁰ Further, TDS points to other examples of the Commission waiving deadlines related to COVID-19 challenges to highlight the impact the pandemic has had across the board.⁵¹ TDS argues that

³⁵ *Id.* at 2.

³⁶ *Id.* at 2.

³⁷ *Id.* at 3.

³⁸ *Id.* at 3.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 4.

⁴² *Id.* at 4.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 5.

⁴⁷ 47 CFR § 54.320(d).

⁴⁸ TDS Petition at 6.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 8.

granting its petition will “provide the opportunity for [TDS] to focus on deploying broadband to unserved and underserved areas instead of planning to deal with funding shortfalls caused by circumstances outside of [TDS’s] control.”⁵²

III. DISCUSSION

12. Generally, the Commission’s rules may be waived for good cause shown.⁵³ Good cause is shown, and waiver is appropriate, only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.⁵⁴ The Commission may, on an individual basis, take into account considerations of hardship, equity, or more effective implementation of overall policy.⁵⁵

13. The Commission has consistently held that requests to waive or extend construction obligations will not be routinely granted.⁵⁶ Consistent with Commission precedent, prospective support recipients should be aware that employee issues, vendor problems, equipment issues, inclement weather, and last minute delays occur in the regular course of business, and that these circumstances alone will not support waiver of Commission deadlines.⁵⁷

⁵² TDS Petition at 9.

⁵³ 47 CFR § 1.3.

⁵⁴ See *Standing Rock Telecommunications, Inc., Amended Request for Limited Waiver and Extension of Mobility Fund Phase I Public Interest Obligations*, WT Docket No. 10-208, Order, 34 FCC Rcd 9598, 9603-04, para. 11 (WCB/WTB/OEA 2019) (*Standing Rock Order*); *Leaco Rural Telephone Cooperative, Inc. and Pine Belt Cellular, Inc.*, WT Docket No. 10-208, Order, 31 FCC Rcd 9001, 9006-07, para. 15 (WTB 2016) (*Leaco/Pine Belt Order*); *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), *cert. denied*, 93 S.Ct. 461 (1972)); see also *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008).

⁵⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁵⁶ See *Skybridge Spectrum Foundation*, Order, 33 FCC Rcd 8138, 8145, para. 17 (WTB-MD 2018); *Wireless Telecommunications Bureau Reminds Wireless Licensees of Construction Obligations*, Public Notice, 32 FCC Rcd 4802, 4802-05 (WTB 2017).

⁵⁷ See, e.g., *1998 Biennial Regulatory Review--Streamlining of Mass Media Applications, Rules, and Processes et al.*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539, para. 35 (1999) (finding that the effects of delays due to inclement weather on construction timelines are adequately overcome by a three-year construction term making additional time unwarranted); *Redwood Wireless Minnesota, LLC, and Redwood Wireless Wisconsin LLC Request for a Waiver and Extension of the Broadband PCS Construction Requirements*, Order, 17 FCC Rcd 22416, 22419-20 (WTB 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); *Eldorado Communications LLC Request for a Waiver and Extension of the Broadband PCS Construction Requirements*, Order, 17 FCC Rcd 24613, 24616, para. 7 (WTB 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); *Bristol MAS Partners Request for Extension of Time in Which to Construct and Place into Operation Multiple Address System Stations WPJF864 Through WPJF87*, Order, 14 FCC Rcd 5007, 5010, para. 8 (WTB 1999) (equipment installation or delivery not delayed for some unique reason, and licensee’s failing to obtain equipment was business decision); *Application for Review of Specialized Mobile Radio Station WAY-671, Licensed to AAT Electronics Corporation, Staten Island, New York*, Memorandum Opinion and Order, 93 FCC 2d 1034, 1047, para. 46 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); *Application for Review of Business Radio Communications Systems, Inc., Licensee of 800 MHz SMR System WZF-975, Laurel, Maryland*, Memorandum Opinion and Order, 102 FCC 2d 714, 716-17, paras. 6-7 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); *Application for Review of Specialized Mobile Radio Station WQA-505, Licensed to Texas Two-Way, Inc., Fort Worth, Texas*, Memorandum Opinion and Order, 98 FCC 2d 1300, 1303, para. 8 (1984), *aff’d sub nom., Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for the delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

14. However, we have also held that the first prong of the waiver standard may be met where a petitioner demonstrates that it faced delays because of special circumstances that it could not reasonably have foreseen, controlled, or avoided.⁵⁸ For example, the Commission found that a waiver was appropriate where “a carrier was able to demonstrate that its failure to meet the required deadline was “due to circumstances beyond their control (e.g. a severe weather event, an inability to secure a right of way, or an unforeseen obstacle that prevents building to a location).”⁵⁹ In those cases, the Commission explained that a carrier may request an extension of time or waiver of the relevant milestone.⁶⁰ The Commission stated that it expected ETCs requesting this relief to “continue to work diligently towards meeting the terms and conditions of their support while their petitions are pending.”⁶¹

15. We find that HT has established special circumstances that warrant granting its petition, as amended, to allow it to count towards its interim and final deployment obligations the 370 locations to which USAC verified HT had previously deployed. HT’s petition demonstrated that it was well on track to meet its interim build-out obligations prior to the Kilauea eruption.⁶² Indeed, USAC verified that HT had “demonstrated compliance with the 60 percent deployment milestone, although 391 locations had become unserviceable due to natural disaster.”⁶³ We agree with HT that strict compliance with Commission rules in this case is “inconsistent with the public interest” because HT had already deployed to these locations prior to an “act of god [that] resulted in unprecedented destruction on the island of Hawai’i and there was no way for HT to anticipate or plan for such an occurrence.”⁶⁴ The fact that the majority of these locations have since been destroyed does not diminish the significant work done and resources invested by HT to build out to these locations, especially where, as here, the destruction was caused by circumstances outside of HT’s control. We believe that HT has demonstrated good cause to continue to count the 370 destroyed locations towards HT’s remaining interim and final milestones.

16. Similarly, TDS has also established special circumstances that justify a waiver of its service milestones. TDS had undertaken significant steps necessary to prepare for its build-out before it was forced, by pandemic restrictions it could not reasonably have expected, to halt work and necessary site visits.⁶⁵ TDS’s ability to complete its buildout on the Quechan Indian Reservation was blocked, through no fault of its own, when the Quechan Indian Tribe issued a stop-work order to TDS.⁶⁶ In the Hornitos area, pandemic-related travel restrictions prevented TDS’s engineers from evaluating the site in preparation for the buildout.⁶⁷ In both instances, it is likely that TDS would have been able to complete its required deployment on time absent actions by others outside its control and circumstances that could not have been anticipated.

17. Therefore, we conclude that the public interest will be served by granting HT’s petition, as amended, and granting TDS’s petition. Strict enforcement of the rules in these instances would fail to

⁵⁸ See *Standing Rock Order*, 34 FCC Rcd at 9604-05, paras. 14-15; *Leaco/Pine Belt Order*, 31 FCC Rcd at 9006-07, paras. 17-18.

⁵⁹ *Connect America Fund*, WC Docket No. 10-90, Order, 35 FCC Rcd 496, 497, para. 4 (WCB 2020).

⁶⁰ *Connect America Fund, et al.*, WC docket Nos. 10-90, et al. Report and Order, 29 FCC Rcd 15644, para. 132 (2014) (*USTelecom Forbearance Order*).

⁶¹ *Id.*

⁶² HT Petition at 2-3.

⁶³ *Id.* at 6-7.

⁶⁴ *Id.* at 9.

⁶⁵ TDS Petition at 2-4.

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 4.

take into account the resources invested by HT to build out to the 370 locations and could potentially inhibit TDS from continuing to work to meet applicable milestones and fully complete deployment. USAC already certified that HT had deployed to many of these locations within its service area,⁶⁸ and TDS expects to complete its buildout in the Winterhaven and Hornitos areas by July 2021.⁶⁹ Thus, we conclude that waiving the rules to the extent described herein is in the public interest.⁷⁰ We direct TDS to report to USAC when it completes the buildout in the Winterhaven and Hornitos areas and, if not completed by July 2021, to provide USAC with a status report.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, under the authority contained in sections 1, 2, 4(i), 5, 10, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 323, and 603 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155, 160, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 503, 1302, and sections 1.1 and 1.3 of the Commission's rules, 47 CFR §§ 1.1, 1.3, the *Petition of Hawaiian Telecom for Waiver of Sections 54.310 and 54.316 of the Commission's Rules*, as amended and as discussed herein, IS GRANTED.

19. IT IS FURTHER ORDERED that, under the authority contained in sections 1, 2, 4(i), 5, 10, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 323, and 603 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155, 160, 201-206, 214, 218-220, 251, 252, 254, 256, 303(r), 332, 403, 503, 1302, and sections 1.1 and 1.3 of the Commission's rules, 47 CFR §§ 1.1, 1., the *Petition for Temporary Waiver of TDS Telecommunications LLC* is HEREBY GRANTED.

20. IT IS FURTHER ORDERED that a copy of this Order SHALL BE transmitted to the Universal Service Administrative Company.

21. IT IS FURTHER ORDERED that, under section 1.103(a) of the Commission's rules, 47 CFR § 1.103(a), this Order SHALL BE effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief
Wireline Competition Bureau

⁶⁸ HT Petition at 2.

⁶⁹ TDS Petition at 4.

⁷⁰ See *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90, 14-58, Order, 32 FCC Rcd 968, 975-76, para. 21 (2017). See also *USF/ICC Transformation Order*, 26 FCC Rcd at 17701, para. 103 (“[A]ll broadband obligations for fixed broadband are conditioned on not spending the funds to serve customers in areas already subsidized by an ‘unsubsidized competitor.’”).